No. 16367

United States Court of Appeals
For the Ninth Circuit

ARTHUR A. ARNHOLD, *et al., Appellants,*
vs.
UNITED STATES OF AMERICA; PORT ANGELES & WESTERN RAILWAY COMPANY, INC., a Delaware corporation; FIBREBOARD PRODUCTS, INC., a Delaware corporation, and A. R. TRUAX, Trustee in Reorganization, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

PETITION OF APPELLEE, FIBREBOARD PRODUCTS, INC., A DELAWARE CORPORATION, FOR REHEARING AND TO REMAND TO THE DISTRICT COURT TO CLARIFY CERTAIN FINDINGS OF FACT PERTAINING TO THIS APPELLEE

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To the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT and to POPE, MAGRUDER and MERRILL, HONORABLE JUDGES of said COURT:

Comes now appellee, Fibreboard Products, Inc., a Delaware corporation, hereinafter referred to as Fibreboard, and petitions the court for a rehearing of the above entitled cause. This appellee also requests that the cause be remanded to the district court for clarification of Findings of Fact referred to on page 7 of the Division opinion in which it is said the district

court found the Forest Service negligent "in its fire fighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard land." This request for a remand to the district court is suggested because the opinion filed October 26, 1960, overlooks the fact that the district court specifically found that the negligence of the Government referred to by the district court in its findings was confined to the dates August 6, and August 7 until such time as the fire went out of the Government's 60-acre tract upon Fibreboard lands. Fibreboard respectfully suggests that this cause should be reheard *en banc* for the reason that it not only involves a large amount of money but establishes far-reaching principles materially affecting and controlling future conduct of landowners who are or may be in the same or similar position of Fibreboard in this case. It also must affect the future conduct of governmental agencies and private landowners in connection with their entering into co-operative agreements such as is referred to in the Division opinion as well as affecting the conduct of said governmental agencies in the performance of their duties created by such co-operative agreements.

The Division opinion holds Fibreboard responsible to third parties by reason of a fire that came upon its land because of no wrongful act or omission on its part. It is held responsible for negligence of public firemen committed before the fire came upon Fibreboard land. The Division opinion holds Fibreboard responsible for negligent acts of the Forest Service personnel who acted as public firemen which negligence this court and

the district court say resulted in the fire going upon and damaging Fibreboard land. Fibreboard as a private owner is held responsible for the negligence of the Government upon whom it had a right to rely as an adjoining land occupier and as a fire fighting agency. As was said by the U.S. Supreme Court in its review of this cause, *Rayonier, Inc. v. United States,* 352 U.S. 315:

> "Petitioners (Fibreboard is in the same position as appellants Rayonier and Arnhold) were aware of this contract and relied on the Forest Service to control and put out the fires involved in this case."

The contract referred to was the Co-Operative Agreement referred to on page 3 of the Division opinion as follows:

> ". . . The United States had undertaken to protect all non-United States owned land in the region from fire and to take 'immediate vigorous action' to control all fires breaking out in the protected area."

Fibreboard was in the protected area.

In spite of its right to rely on the contract above referred to, Fibreboard is held responsible for appellants' damage caused by the Government's breach of duty committed on government land as a land occupier upon whose land the fire started and because of the Government's failure to perform as required by the Co-Operative Agreement.

Fibreboard is held liable regardless of the fact that the record shows and the Supreme Court of the United

States said in *Rayonier, Inc. v. United States,* 352 U.S. 315, that:

> "Shortly after the fire started United States forest personnel appeared and took exclusive direction and control of all fire suppression activities."

By virtue of the Co-Operative Agreement made pursuant to 16 U.S.C. 572, and R.C.W. 76.04.400, the State of Washington had substituted the Forest Service as public firemen for county and district fire wardens. Fibreboard as a private landowner would have had no duty, power or right to control county or state fire wardens who would have been in charge of fire fighting in this area in the absence of the Co-Operative Agreement. Neither did Fibreboard have any right, duty or power to control the activities of the United States Forest Service personnel who assumed exclusive direction and control of all fire suppression activities out of which this litigation arises. It is submitted that this cause should be reheard for the following reasons:

Summary of Reasons Rehearing Should Be Granted to Fibreboard and Case Remanded for Clarification of Any Uncertainty in Findings Pertaining to This Appellee

I.

The Division opinion holds Fibreboard liable for the Government's negligence. This theory or issue of "delegatee" and delegator or master and servant as between the Government and Fibreboard was first injected into the case by the Division opinion. No claim has ever been made by any party that Fibreboard be

held liable for and through negligent conduct of the Forest Service (See page 6, *infra*).

II.

The Division opinion mistakenly holds that the District Court found Government negligent August 6-10. Specific findings of District Court limit negligence of Government to August 6th and August 7th until fire escaped from Government land to Fibreboard land. This case should be remanded to District Court for additional findings to clarify any possible uncertainty on this question (See page 7, *infra*).

III.

Fibreboard had right to rely on Government to fight fire with due care and to take "immediate, vigorous action" to control the fire as required by the terms of the Co-Operative Agreement. This same right of reliance by Fibreboard also stemmed from the fact that the Government owned the adjoining lands where the 60-acre fire started and from which the fire spread onto Fibreboard land mid-afternoon of August 7, 1951 (See page 10, *infra*).

IV.

The Division opinion is based on wrong principles in applying the doctrines of proximate cause and burden of proof. The Division opinion is in conflict with Washington law on these points or doctrines (See page 12, *infra*).

V.

The Division opinion goes behind and beyond the Findings of Fact as to Fibreboard (See page 16, *infra*).

VI.

The Division opinion, in attaching liability to Fibreboard, applies what this court once referred to as a harsh rule (See page 17, *infra*).

See: *Rayonier, Inc .v. United States,* 225 F.(2d) 642, where this court said:

> "We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. . . . To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

I.

The Division opinion holds Fibreboard liable for the Government's negligence. This theory or issue of "delegatee" and delegator or master and servant between the Government and Fibreboard was first injected into the case by the Division opinion. No claim has ever been made by any party that Fibreboard be held liable for and through negligent conduct of the Forest Service.

In holding Fibreboard liable for or because of the Government's negligence, the Division opinion injects a theory into the case that has not heretofore been asserted or contended for by any party. This matter was not considered by the district court, because there was no issue before it on this point. It is well settled that a new issue should not be injected into the case by the

reviewing court to sustain a reversal as distinguished from an affirmance of the district court. To hold otherwise would subject a litigant to liability on a theory against which it had no opportunity to defend. This issue having been raised by the Division opinion for the first time in the history of this litigation, Fibreboard should now be given an opportunity to be heard on this new issue as it applies to Fibreboard.

Holding Fibreboard liable because of negligence of Government personnel is beyond the issues heretofore framed as they pertain to Fibreboard and as outlined by the pleadings, the pre-trial order, and the assigned points on appeal relied on by appellants. We therefore respectfully urge that Fibreboard should be given an opportunity to defend against this new theory first injected into the case by the Division opinion.

II.

The Division opinion mistakenly holds that the District Court found Government negligent August 6-10. Specific findings of District Court limit negligence of Government to August 6th and August 7th until fire escaped from Government land to Fibreboard land. This case should be remanded to District Court for additional findings to clarify any possible uncertainty on this question.

On page 7 of the Division opinion, it is stated that:

> "The district court found the Forest Service negligent 'in its fire fighting action during the initial period August 6-10, in which interval the fire reached Fibreboard lands'."

This statement overlooks the fact that the above quo-

tation is taken from the court's memorandum decision (R. 189). It overlooks the fact that this statement was made in the district court's memorandum decision where the court had arbitrarily grouped certain periods of the fire for discussion purposes (R. 191, 192). The period of August 6-10 was referred to as the time elapsing from the time the Heckelville fire was first discovered until it was contained in the 1,600-acre area. It overlooks the fact that subsequent to the memorandum decision the district court entered specific Findings of Fact and Conclusions of Law and Amended Findings of Fact and Conclusions of Law in which it found and concluded that the Government's negligence was committed on August 6 and 7 while the Government personnel was fighting the fire on Government land and before the fire came onto Fibreboard land. R. 212, Finding XVI, and R. 214, Finding IV, and R. 235, Amended Finding XVII, in which the court found:

> "Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop up or other fire fighting activities after August 7 . . ."

And R. 237, Amended Conclusion of Law IV, where the court said:

> "Defendant United States was negligent in failing to use reasonable care in fighting the Heckelville fire on August 6 and 7."

The Division opinion also overlooks the fact that during the argument of all of the plaintiffs' motions to amend the findings, the district court specifically lim-

ited his findings of Government negligence to August 6 and 7 and said:

> "THE COURT: I am concerned with whether I have used the right language to express what I found and believe. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required."

It is clear from the arguments in all of the appellants' briefs that they understood that the court's finding pertaining to Government negligence was limited to August 6 and 7 while the fire was being fought on Government land and before it went upon Fibreboard's land. Finding XVI quoted on page 5 of the Division opinion again illustrates that the court's finding of negligence was limited to the activities of the Government personnel while fighting fire on the 60-acre Government-owned area where in that finding it is said:

> "Employees of the United States, failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care *in attacking the Heckelville spot fire and in attempting to confine it to the 60-acre area.*" (Italics ours)

It is submitted that if there is any doubt as to the intention of the district court to limit its findings of negligence of the Government to August 6 and 7 while it was fighting the fire on Government land, the cause should be remanded to the district court to clarify the findings on this point.

III.

Fibreboard had right to rely on Government to fight fire with due care and to take "immediate, vigorous action" to control the fire as required by the terms of the Co-Operative Agreement. This same right of reliance by Fibreboard stemmed from the fact that th Government owned the adjoining lands where the 60-acre fire started and from which the fire spread onto Fibreboard land mid afternoon of August 7, 1951.

Fibreboard had a right to rely on the Government to use due diligence in fighting fire on its own land as an occupier of lands adjacent to Fibreboard land. It had the additional right of reliance because of the terms of the Co-Operative Agreement.

On page 3 of the Division opinion, in referring to the Co-Operative Agreement, it is said that:

> "This agreement, which was relied upon by Rayonier and by others, would be the basis of an affirmative obligation of the United States to use care in the premises if there were no other basis of liability on its part in its capacity as land occupier."

Fibreboard had the same right and a duty to rely on this agreement as did Rayonier and Arnhold. Notwithstanding these facts, Fibreboard is here held for the negligence of the Government which was committed before the fire came upon Fibreboard land. Fibreboard is held through and because of this negligence which is said by the court to have been a cause of the fire getting out of the 60-acre Government tract and going into Fibreboard lands.

The Government assumed full control of these fires shortly after they started on August 6.

One of appellant Arnhold's requested Conclusions of Law, R. 460, Paragraph XIII, reads as follows:

> "The assumption of control and direction of all fire fighting efforts by Mr. Floe and his subordinates at 12:30 p.m. on August 6, 1951, and retention of such control continuously thereafter, thereby causing plaintiffs and additional plaintiffs, *among others,* to rely in this regard, charged the Government with the duty, dischargeable by Mr. Floe and his subordinates, to employ every reasonable skill and effort to control and suppress the fire. This duty supplements and is in addition to the same duty theretofore assumed by the Government's becoming a party to the Cooperative Agreement." (Italics ours)

It will thus be seen that appellants Arnhold urged in the district court that the Government assumed control of the fire on August 6 at 12:30 p.m.; that it retained such control continuously thereafter and that this fact justified plaintiffs "among others" to rely in this regard. Certainly, Fibreboard, as a member of the Co-Operative Agreement and a neighboring landowner to the Government, was one of the "others" entitled to rely on the Government to employ reasonable skill in its efforts to suppress the fire after the Forest Service had assumed complete and exclusive control and direction of all fire suppression activities.

Appellants Arnhold, in their brief at page 52, agreed that Fibreboard could not and should not interfere with Forest Service activities where it is said:

"Argument and the Court's Findings that Fibreboard could not interfere with the Forest Service management of the fire was essentially pointless. *No one suggested it should do so.*" (Italics ours)

IV.

The Division opinion is based on wrong principles in applying the doctrines of proximate cause and burden of proof. The Division opinion is in conflict with Washington law on these points or doctrines.

The Division opinion is decided on wrong principles of law as they apply to the doctrine of proximate cause and burden of proof established by the laws of the State of Washington.

The word "negligence" is used in the Division opinion as encompassing both negligence and proximate cause. Such is not the law in Washington. Washington law requires that plaintiff sustain the burden of proof in showing or proving negligence and the plaintiff must likewise sustain the burden of proof in showing that such negligence proximately caused plaintiff's damage.

Uniform Jury Instructions adopted by the Washington court provide that the plaintiff "has the burden of proving, by a fair preponderance of the evidence, that the defendant was negligent in some one of the particulars claimed, and that such negligence was a proximate cause of the injury and damage complained of." This rule is recognized in appellant Arnhold's brief at page 26 where it is said:

"There are not differing requirements of proof of negligence and proof of proximate cause."

The rule is succinctly stated by the Washington Supreme Court in *Evans v. Yakima Valley Transportation Co., en banc,* 1952, 39 Wn.(2d) 841, 239 P.(2d) 336, as follows:

> "In order to establish a cause of action, plaintiff must prove that the actions of defendant's bus driver constituted negligence towards her, and that his negligent actions were the legal, or proximate, cause of her injury. *Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury.*" (Italics ours)

In *Wilson v. Northern Pacific R. Co.,* 44 Wn.(2d) 122, 265 P.(2d) 815, the law of Washington, as reflected by this opinion, is accurately summarized in the headnotes as follows:

> "A person seeking relief in damages for injuries sustained must not only prove a negligent act, but must also prove that it was the proximate cause of the injuries; and while proximate cause may be proved by circumstantial evidence, such proof must be upon evidence, not speculation or conjecture . . ."

In *Udhus v. Peglow,* 155 Wash. Dec. 942, 350 P.(2d) 640, decided March 31, 1960, since the briefs in the case at bar were written, the appellant assigned error on a finding similar to the findings made by the district court in the instant case. In the *Udhus* case, the court made the following findings:

> "That plaintiff Edwin Udhus, entered the aforesaid intersection at a rate of speed in excess of 35 miles per hour in violation of R.C.W. 46.28.021;

> that said speed was not a proximate cause of the accident."

In discussing this finding, the Washington Supreme Court said:

> "Appellants assign error to the court's finding that respondent's excessive speed was not a proximate cause of the accident."

The Washington Supreme Court affirmed the trial court because the plaintiff had not sustained the burden of showing that the negligence referred to in the quoted finding was a proximate cause of the accident. This is true even though the plaintiff Udhus had violated a positive statute according to the finding and was thus negligent as a matter of law. Obviously, the purpose of the statute referred to in the finding in limiting speed at the intersection was to avoid accidents. Therefore, it could have been said that it was reasonably foreseeable that an accident would occur if the speed limitation was violated.

The foregoing citations point up the fact that the Division opinion misconstrues the Washington law in connection with the plaintiff's burden of proving proximate cause when on page 6 of that opinion it is said:

> "The burden of proof is certainly not upon the plaintiff to show that, had the defendant not been negligent at the start, the fire would have been contained within any particular space."

The burden of proof was on appellants to show that the negligence of August 6 and 7, found by the district court, proximately caused the fire to escape from the

60-acre tract on Government land and spread into Fibreboard land. It is suggested that the above quoted statement from page 6 of the Division opinion is an inaccurate statement of the rule of burden of proof as applied in the State of Washington.

The Division opinion on page 4 asserts that when the district court found Government personnel to be initially negligent, "we take it he means not negligent in the abstract, . . ." This statement overlooks the fact that the district court definitely stated not only in the findings but during a post-trial argument exactly what he meant. At R. 292, the district court said:

> "I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required . . . In my judgment, under the evidence and considering the conditions existing at the time, *it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period.*" (Italics ours)

The district court went on to say on the same page that the fire could not have been controlled, in the absence of any negligence of Government personnel, "under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time." Obviously, the district court believed that the fire could not have been controlled even in the absence of any negligence on the part of Government personnel. Therefore, the negligence found by the district court, whether it be re-

ferred to as negligence "in the abstract" or otherwise, was not proved to be the proximate cause of the fire spreading onto Fibreboard land. Thus, the trial court was forced to conclude that appellants had failed to sustain the burden of proving that the Government's negligence of August 6 and 7 proximately caused the spread of the fire onto Fibreboard lands.

We have taken the liberty of referring to these decisions above cited for the reason that not until the Division opinion was filed had Fibreboard been charged with liability through or by reason of any negligent acts of the Forest Service personnel.

V.

The Division opinion goes behind and beyond the Findings of Fact as to Fibreboard.

On page 2 of the opinion it is said:

> "In the view we take, it is not necessary to go behind the district court's findings of fact."

On page 59 of appellant Arnhold's opening brief, this court is asked to reverse the district court as to the United States and the Railroad "upon the Findings of Fact." It is then suggested that this court should reverse the district court as to Fibreboard "on the preponderance of the evidence and the law of the State of Washington." Obviously. these appellants recognized that the Findings of Fact made in behalf of Fibreboard were not clearly erroneous and therefore requested a reversal as to Fibreboard "on the preponderance of the evidence." No suggestion was ever made by any appellants that Fibreboard should be held responsible

through and by reason of Government personnel negligence of August 6 and 7. The district court exonerated Fibreboard from all of the grounds of negligence charged by the appellants. This was done in the district court's Memorandum Decision and Findings of Fact and Amended Findings of Fact. R. 189 for Memorandum Decision, ¶ 212, Finding XIV, in which the court found:

> "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particualrs of negligence alleged by plaintiffs."

This identical finding is contained in Amended Finding XV, R. 234.

In view of these findings exonerating Fibreboard from all charges of negligence made against it in the district court, it is respectfully submitted that Fibreboard should have an opportunity to be heard in connection with the manner in which liability is here fastened upon it by the Division opinion.

VI.

The Division opinion, in attaching liability to Fibreboard, applies what this court once referred to as a harsh rule.

In *Rayonier, Inc. v. United States,* 225 F.(2d) 642, this court said:

> "We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. . . . To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged

> notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

It is clear that the Division opinion does impose the "harsh rule" on Fibreboard. The harsh rule referred to is imposed on a theory not urged by any of the appellants in the court below or in this court.

The harsh rule referred to becomes even more harsh when we are reminded that Fibreboard's conduct and cooperation with the Forest Service from August 6 to September 20 was highly commended and approved by the Forest Service (Tr. 4074-4079); that the fire first escaped from the Government 60-acre tract into an adjoining 1,500-foot strip of sixty-five-year-old timber on Fibreboard land and burned that green timber (Tr. 2012, 3477, 4488); that no one suggested in the trial below that Fibreboard could or should interfere with the Forest Service's management of the fire; see appellant Arnhold's brief page 52; and finally that it is an admitted fact in the pre-trial order "that defendant Fibreboard had paid all fire patrol assessments necessary to qualify it for protection under the Co-Operative Agreement." R. 358-359.

Fibreboard is held liable by the Division opinion because of Forest Service negligence. In view of the fact that this question has never previously been raised, we suggest that this case should be remanded to the district court for additional findings pertaining to this subject matter.

It is further respectfully suggested by Fibreboard

that the case should in any event be remanded to the district court as to Fibreboard to allow the district court to clarify any possible question of whether or not it found any negligence on the part of Forest Service personnel subsequent to August 6th and 7th after the fire spread from the 60-acre area on Government property to Fibreboard land.

If the district court should find, as contended by Fibreboard, that the Government's negligence was committed only while fighting the fire in the Government-owned 60-acre area on August 6th and 7th before the fire spread onto Fibreboard land, the last two paragraphs of the Division opinion could be modified and an affirmance of the district court's judgment as to Fibreboard would follow.

WHEREFORE, Fibreboard respectfully prays that its petition for a rehearing be granted, respectfully suggests that it be granted *en banc,* and that in any event the cause be remanded as to Fibreboard to the district court for clarification of findings as hereinabove suggested and that the judgment of the district court upon further consideration be affirmed as to Fibreboard.

Respectfully submitted,

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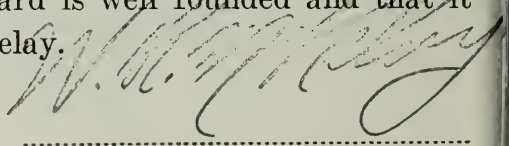
CERTIFICATE OF COUNSEL

W. R. McKelvy, of counsel for Appellee Fibreboard Products, Inc., a Delaware corporation, hereby certifies that he is and has been at all times since the commencement of the above litigation, familiar with said litigation and has personally participated in all proceedings in behalf of Appellee Fibreboard Products, Inc., and I do hereby certify that in my judgment the accompanying petition for rehearing, including the request to remand to the District Court to clarify Findings pertaining to Fibreboard is well founded and that it is not interposed for delay.



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W. R. McKelvy